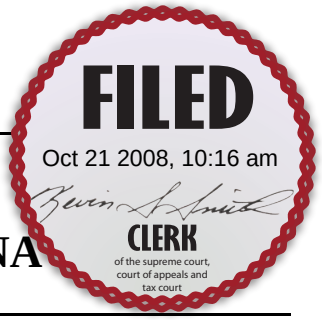
ATTORNEY FOR APPELLANT:

MARCEL KATZ
Law Offices of Marcel Katz
Lafayette, Indiana

ATTORNEY FOR APPELLEE:

L. DOWAL DELLINGER
Dellinger Dellinger & Smith
Monticello, Indiana



IN THE COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF MURRAY FRANKLIN JACKS, Appellant-Respondent, vs. MARLA D. JACKS n/k/a MARLA D. VALENTA, Appellee-Petitioner.	)))))))))))	No. 91A04-0803-CV-182

APPEAL FROM THE WHITE CIRCUIT COURT
The Honorable Robert W. Thacker, Judge
Cause No. 91C01-9906-DR-92

October 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

We again meet Marla D. Valenta (formerly Marla D. Jacks) ("Marla") and Murray Franklin Jacks ("Frank") in this, their second appeal of their ongoing post-dissolution issues. We express the hope that, "This appeal is the latest stop on the torturous path to dispute resolution between these two parties." *N. Ind. Commuter Transp. Dist. v. Chicago Southshore & South Bend R.R.*, 793 N.E.2d 1133, 1134 (Ind. Ct. App. 2003). On remand from this court in the prior appeal, the White Circuit Court ("Indiana Court") issued an order on November 5, 2007, from which former husband Frank now appeals and raises the following restated issues:

I. Whether the Indiana Court erred in calculating Frank's arrearage when it determined that support for A.J. continued through May 2004, the date that she graduated from high school, rather than when she turned eighteen years old in October 2003.

II. Whether the Indiana Court erred when it determined that Frank owed child support for R.J. after her graduation from high school in June 2006 and was in contempt for failing to continue to pay child support for her after that time.

III. Whether the Indiana Court properly credited Frank with two child support payments that he paid via Georgia income withholding proceedings.

IV. Whether the Indiana Court erred in awarding trial and appellate attorney fees in favor of former wife Marla.

We vacate and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Because not all of the facts of our previous memorandum decision, *Jacks v. Jacks*, No. 91A02-0607-CV-603, slip op. at 2-6 (Ind. Ct. App. Apr. 24, 2007) ("*Jacks I*") are relevant to today's issues, we will attempt to restate only those with bearing on the current appeal and

add other pertinent facts as necessary.

Frank and Marla are the parents of three children: (1) A.J., born October 29, 1985; (2) R.J., born September 9, 1988; and (3) H.J., born April 30, 1991. The Superior Court of Cobb County, Georgia ("Georgia Court") dissolved Frank and Marla's marriage in February 1996.[1] At that time, the parties entered into a court-approved settlement agreement ("Agreement"), under which Frank would pay Marla in an amount equal to thirty percent of his gross income for the support of the parties' three children, and that percentage amount would reduce as the number of children for whom he owed support reduced. The Agreement, which was signed by the parties, incorporated into the divorce decree, and approved by the court, stated that child support "shall continue until the children die, marry, graduate from high school, or reach the age of eighteen years, *whichever shall first occur*." *Appellant's App*. at 19 (emphasis added).

Throughout the ensuing years, Frank did not provide his annual income information to Marla as agreed in the Agreement. She pursued recourse through the White County Title IV-D Office, who in turn contacted the Cobb County, Georgia UIFSA Child Support Enforcement Division ("Georgia IV-D Office"). Eventually, on May 28, 2004, the Georgia Court issued an order determining that child support should be increased to "$603.95 per CHILD per MONTH." *Id*. at 31. Despite this order, other unresolved matters continue to pend, including Marla's petition to modify, her request for an arrearage determination, and the parties' respective contempt petitions. The Georgia Court issued an order in October

[1] Marla and the parties' three children moved to Indiana before the divorce was final. They continue to reside here, and Frank continues to reside in Georgia.

2005 that the arrearage issue would be best decided in Indiana.

Thereafter, on March 22, 2006, the Indiana Court held a hearing. It issued a Final Judgment and Order on June 19, 2006, ordering, among other things, that semi-monthly payments of $603.95 were reasonable and would continue "until further Order of this Court." *Id*. at 43, 46.

The parties' oldest child, A.J., turned eighteen years old on October 29, 2003, and she subsequently graduated from high school in May 2004.[2] Their middle daughter, R.J., graduated from high school in early June 2006; she turned eighteen several months later, on September 9, 2006.[3]

Frank stopped paying child support for R.J. when she turned eighteen in the fall of 2006. On January 31, 2007, Marla filed a petition for contempt alleging that Frank was in contempt for failing to timely pay attorney fees, failing to timely make installment payments on his arrearage, and failing to make semi-monthly child support payments of $603.95, which included child support for R.J.

---

[2] In this appeal, it has come to our attention that we were in error when in our *Jacks I* memorandum decision we stated that A.J. graduated in May 2003. While unfortunate that we misstated the year of her graduation, and we regret that error, it was based on the record before us, where we were presented with the following: (1) Frank stated in his Appellant's Brief that A.J. graduated in 2003; (2) Marla did not raise that error in her Appellee's Brief or seek to correct it by way of a petition for rehearing; and (3) Marla herself expressly testified that A.J. graduated in 2003. *See Jacks I Tr*. at 47 (hearing of Mar. 22, 2006). There was no diploma or other written confirmation of her graduation included in the record before us.

[3] According to the record before us, H.J., the parties' youngest daughter, was sixteen years old and about to begin her junior year of high school as of the August 8, 2007 hearing date. *Tr*. at 26. Assuming the ordinary educational progression, the 2008-09 school year should be H.J.'s senior year, and she will turn eighteen in April 2009, shortly before her presumed graduation in June 2009.

Thereafter, on April 24, 2007, we issued the *Jacks I* decision. In it, we determined, among other things, that when the Indiana Court ordered that Frank pay $603.95 per child per month in its June 2006 order, it did not thereby modify the Georgia decree. It was merely enforcing it. We also determined that Frank's obligation for child support for A.J. should have ended in October 2003 when she turned eighteen, and the arrearage determination should be recalculated accordingly. We remanded the case to the Indiana Court to amend its June 2006 Order and reduce the arrearage determination as necessary to reflect that Frank did not owe child support for A.J. after she turned eighteen in October 2003.

Subsequently, on August 8, 2007, the Indiana Court held a hearing on the matter of calculating Frank's arrearage pursuant to this court's *Jacks I* opinion. Also at issue were various pending motions[4] that included: (1) the matter of on what date Frank no longer owed support for R.J., as that determination would impact the total arrearage issue, and (2) Marla's petition for contempt, where she asserted Frank improperly stopped paying support for R.J.; and (3) the matter of attorney fees, namely whether Frank owed them to Marla's attorneys for the prosecution of the appeal and, separately, for the prosecution of the contempt proceeding. At the hearing, Frank also sought to have the Indiana Court recognize as a credit in its arrearage calculation that he had paid $1,316.24 in child support via withholding proceedings by the Georgia IV-D Office.

On November 5, 2007, the Indiana Court issued its Judgment and Order ("November

2007 Order"). In it, the Indiana Court determined that because Frank never filed a motion to modify the Indiana Court's June 2006 $603.95 bi-monthly support order, he continues to owe that amount, child support arrearage accrued accordingly, and Frank is in contempt for failing to pay it. With regard to attorney fees, the court also found that Frank was in contempt for not paying previously-ordered attorney fees on time, thus requiring Marla to file a petition for contempt to compel Frank to pay them. Consequently, the court determined that Frank owed $750.00 to Marla's attorneys. It also ruled that Frank owed $3,750.00 in appellate attorneys fees.[5] Additionally, the Indiana Court determined that A.J. should have been considered emancipated on June 1, 2004, after she graduated from high school, and that Frank owed child support for her through that date. The November 2007 Order calculated Frank's arrearage accordingly.

Frank filed a motion to correct error, which the court denied, and Frank now appeals.

DISCUSSION AND DECISION

If no instructions are given to a trial court on remand, the course of further proceedings is within the discretion of the trial court. *See Grant v. Hager*, 879 N.E.2d 628, 631 (Ind. Ct. App. 2008) (no instructions given to trial court with respect to holding hearing on remand). However, a trial court's failure to follow appellate instructions requires reversal. *See McMaster v. McMaster*, 681 N.E.2d 744, 748 (Ind. Ct. App. 1997) (trial court's failure on remand to reduce attorney fee award was inconsistent with appellate remand instruction).

---

[4] It appears that, in addition to our remand instructions, the following motions were before the Indiana Court: Frank's request to modify the arrearage payment schedule; Marla's June 11, 2007 request for appellate attorney fees; and Marla's January 31, 2007 petition to cite for contempt.

[5] Frank does not appeal the trial court's order of appellate attorney fees in favor of Marla. We discuss the matter of attorney fees, trial and appellate, in Section IV.

Frank asserts that the Indiana Court erred when it failed to follow our instructions in *Jacks I* regarding arrearage calculation and child support obligations for both A.J. and R.J. We will address the obligations for each daughter separately.

I. Arrearage for A.J.

In our *Jacks I* memorandum decision, we instructed the Indiana Court to recalculate Frank's child support arrearage, taking into account that pursuant to the Agreement Frank's child support obligation for A.J. terminated in October 2003, when she turned eighteen. *Appellant's App*. at 67-69. On remand, the Indiana Court did not do so. Rather, it determined that Frank's obligation for A.J. continued through May 2004, when she graduated from high school, and it calculated his arrearage accordingly.

Marla faults Frank, stating that "[b]ecause Frank incorrectly informed the Appellate Court" that A.J.'s graduation date was May 2003, we erroneously determined in *Jacks I* that her date of emancipation was in October 2003. Marla asserts that, therefore, the Indiana Court was "well within its authority [on remand] to redetermine the correct arrearage amount based upon the correct emancipation date[.]" *Appellee's Br*. at 6. Her position is incorrect on a number of fronts.

First, Frank was not the only one who "incorrectly informed the Appellate Court" that A.J. graduated in May 2003. In her testimony, Marla stated that A.J. graduated in 2003. *Jacks I Tr*. at 47. Further, she did not petition this court for rehearing pursuant to Ind. Appellate Rule 54(E) to notify us of the error and ask us to reconsider our holdings. Second, even if the correct May 2004 graduation date had been provided to us in the first appeal, A.J.

turned eighteen in October 2003, and as October 2003 is the earlier of the two dates (eighteenth birthday and graduation), this is the date child support terminated by virtue of the parties' Agreement.[6] Third, regardless of whether A.J.'s graduation was in May 2003 or 2004, the Indiana Court was not "well within its authority" to disregard our instructions in *Jacks I*, as Marla claims, and she is not now free to relitigate the matter of the date on which Frank's child support obligation terminated. That issue was decided in *Jacks I*, and the law of the case doctrine precludes relitigation of it. This court has explained when the law of the case doctrine applies to remands and subsequent appeals:

> Under the law of the case doctrine, an appellate court's determination of a legal issue is binding both on the trial court on remand and the appellate court on a subsequent appeal, given the same case with substantially the same facts. All issues decided directly or implicitly in a prior decision are binding on all subsequent portions of the case. The doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided. The doctrine is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter.

Adams v. Chavez, 877 N.E.2d 1246, 1247 (Ind. Ct. App. 2007).

Here, Frank did not owe support for A.J. beginning in November 2003. *See Jacks I*, slip op. at 14-16; *Appellant's App*. at 69. We instruct the Indiana Court on remand to re-compute his arrearage accordingly.

---

[6] In reaching its decision that Frank's obligation for A.J. continued after her eighteenth birthday, the Indiana Court referred to language of the Georgia divorce decree that is not consistent with the Agreement and states essentially that support was required until the child turned eighteen, except that if the child turned eighteen while she was attending a secondary school on a full time basis, then the support obligation continued. *Appellant's App*. at 74. While the form language of the decree is indeed inconsistent, the Agreement was not a form document. It was apparently prepared by counsel for one or both of the parties, and it was executed by both parties. Furthermore, handwritten language inserted on the first page of the decree expressly states, "The Agreement attached hereto is incorporated into this Final Decree and the parties are ordered to comply herewith." *Id*. at 26. The Agreement constituted a binding contract between the parties. *See Ogle v. Ogle*, 769 N.E.2d 644, 647 (Ind. Ct. App. 2002), *trans. denied*.

II. Child Support for R.J.

In August 2007, subsequent to *Jacks I*, the Indiana Court held a hearing to apply our instructions from that opinion and, additionally, to rule on other pending motions, which included Marla's petition for contempt that urged Frank was in contempt for failing to continue to pay child support for R.J., the parties' middle daughter. In November 2007, the Indiana Court issued its order, which determined that Frank was still obligated to pay child support for R.J., even though she had turned eighteen and graduated from high school, and was in contempt for his failure to do so. Frank asserts this was in error, and we agree.

Here, the Agreement provides that Frank would owe child support for each child until she graduated from high school or turned eighteen, whichever occurred first. *Appellant's App*. at 19. Parties are free to draft their own settlement agreement upon dissolution of their marriage. *Ogle v. Ogle*, 769 N.E.2d 644, 647 (Ind. Ct. App. 2002). Once a court incorporates a settlement agreement devised by the parties into a divorce decree, the terms of that agreement are legally binding and enforceable. *Id*. Appellate courts will enforce an agreement concerning custody and support even though the dissolution court would otherwise not have the authority to do as the parties agreed. *Id*.

Nevertheless, the Indiana Court reasoned that because Frank did not file a petition to modify, either in Indiana or Georgia, he still continues to owe support for R.J. *Appellant's App*. at 71-72. The Indiana Court relied on the long-standing rule that a noncustodial parent may not unilaterally reduce a child support obligation, but must make payments in the manner, amount, and at times required by an in gross support order until a court orders a modification or all of the children are emancipated or reach the age of twenty-one years. *Id*.

In this case, however, the existing[7] support order is not an "in gross" or undivided child support order. Rather, the May 2004 Georgia child support order specifically ordered, "$603.95 per CHILD per MONTH." *Jacks I Appellant's App.* at 48 (emphasis in original). Under these circumstances, we find the principles requiring modification of an in gross order covering multiple children do not apply.

In further support of its ruling that Frank still owed support for R.J., the Indiana Court referred to language in its June 2006 Order, which stated that the parties had "stipulated and agreed" that the $603.95 semi-monthly payments would continue "until further Order of this Court." *See id*. at 11, 14 (Indiana Court's June 19, 2006 order at paragraphs 34 and 40). However, it is not clear whether the parties actually stipulated that the payments would continue until "further order of the court," or whether they stipulated only to "semi-monthly" and the amount thereof. That is, the language of the June 2006 Order states that it was the Court that found "that the semi-monthly support payments of $603.95 [were] reasonable . . . and shall continue until further Order of this Court." In an effort to clarify who agreed to what, and to what extent, we reviewed the record before us, and that of *Jacks I*, to locate the actual stipulation. No written stipulation was submitted to the Indiana Court; however, it appears that during a sidebar at a March 2006 hearing (which preceded *Jacks I*), counsel for both parties agreed that the Georgia child support order covering two children (not three) was appropriate because the oldest "is not in school and is 18," thereby suggesting that support

[7] The Georgia support order remains the existing order of support: In our *Jacks I* opinion, we determined, "at no time has the Indiana Court modified child support in this case; rather it has only enforced the provisions of the parties' Decree and Agreement, which in September 2005 were properly registered in Indiana." *Appellant's App*. at 62; *Jacks I*, slip op. at 9.

for her was no longer required. *Jacks I Tr*. at 81. This seems a reasonable stipulation that recognizes the provision in the Agreement that provides, essentially, for automatic termination of child support when the child graduates from high school or reaches the age of eighteen, whichever occurs first. Marla's argument asks us to disregard the Agreement. We decline to do so, as it would be error for us to purport to have the authority to re-write the parties' Agreement.

Here, R.J. graduated from high school in late May/early June 2006, but Frank continued to pay child support for her through September 2006, when she turned eighteen years old. Her graduation was the earlier of the two dates, and under the terms of the Agreement, Frank's obligation to pay support for her ended at that time.[8] Accordingly, Frank overpaid (June, July, August, and September 2006); on remand, we instruct the trial court to credit Frank with all child support payments he made for R.J. after she graduated from high school.

III. Support Payments Made Via Income Withholding

Neither party disputes that Frank paid $1,316.24 in child support through income withholding and that he "should be credited for all child support payments made to [Marla] including the $1,316.24 withheld from his wage." *Appellee's Br*. at 3; *Tr*. at 14 (two payments totaling $1,316.24 were withheld from Frank's paychecks in December 2006). The outstanding question is whether the Indiana Court credited Frank with that amount when it

was calculating his arrearage. Frank asserts that it did not; Marla maintains that the Indiana Court's calculation of child support paid between July 1, 2006 and July 21, 2007 does, in fact, include the $1,316.24. The trial court's November 2007 Order is silent as to whether it included or excluded those monies.[9]

On remand, we instruct the Indiana Court to clarify whether and/or how it included those funds in its computation of the arrearage based upon the amount of paid child support.

IV. Attorney Fees

In its November 2007 Order, the Indiana Court awarded Marla attorney fees as follows: (1) $750.00 pursuant to her January 31, 2007 petition for contempt; and (2) $3,750.00 in appellate attorney fees.

Frank argues that Article 1, Section 22 of the Indiana Constitution, which prohibits imprisonment for nonpayment of debt, prevents courts from enforcing attorney fee orders by contempt, and, consequently, the Indiana Court erred by awarding the $750.00 in trial

---

[8] We note that, in his Brief, Frank refers to a March 5, 2007, letter from the Georgia Office of Child Support Services to Frank, which states, "The current order for one child is $603.95." The letter states, "All children have emancipated," except the youngest, H.J. *Appellant's Br*. at 20; *Appellant's App*. at 60. Frank states that he submitted the letter to the Indiana Court at the August 2007 hearing. *Appellant's Br*. at 20. However, the record before us does not reflect where or how that letter was submitted, whether provided as an exhibit or otherwise.

[9] We readily acknowledge that the Indiana Court possesses much more information regarding what payments Frank has made, and when and how he made them. However, based on our limited information, our calculations suggest that the Indiana Court did, in fact, credit $1,316.24 to Frank when determining what he paid during the period of July 1, 2006 through July 31, 2007: In July, August, and September 2006, Frank was still paying for R.J. (making semi-monthly payments of $603.95) and thus paid $1,207.90 per month – or a total of $3,623.70 for those three months. He paid $603.95 per month for the remaining ten months of the period (October 2006 through July 2007) – or $6,039.50. Those two figures ($3,623.70 + $6,039.50) total $9,663.20. If the disputed $1,316.24 is added to $9,663.20, the total paid becomes $10,979.44. In its November 2007 Order, the Indiana Court determined that Frank paid $10,978.19 for the period of July 1, 2006 through July 31, 2007. The difference between $10,979.44 (our calculations) and $10,978.19 (Indiana Court's determination) is $1.25. This suggests to us the likelihood that the $1,316.24 was included in the Indiana Court's arrearage computation.

attorney fees. Marla counters that the $750.00 award was only based on Frank's contempt for nonpayment of support for R.J., not nonpayment of attorney fees, and thus was an appropriate remedy.

A copy of Marla's January 31, 2007 petition for contempt is not included in the record before us. However, the Indiana Court's November 2007 Order indicates that the petition requested that the trial court find Frank in contempt for several things: (1) failure to pay child support [for R.J.]; (2) failure to pay a lump sum arrearage amount as ordered by the trial court in its June 2006 Final Order; and (3) failure to pay $3,000.00 in attorney fees as ordered by the trial court in its June 2006 Order. The Indiana Court recognized that Frank "purged himself" of the contempt to pay attorney fees and the arrearage balance, but did not do so in a timely fashion, and, consequently, Marla was required to file the petition for contempt in order to compel Frank to pay those amounts. *Appellant's App*. at 72. Thereafter, the Court ordered Frank to pay Marla $750.00 in attorney fees. The court's order did not expressly state whether the $750.00 award was based, in any part, on Frank's delinquent payment of attorney fees.

Because we are vacating the Indiana Court's November 2007 Order in its entirety, we do not need to ascertain the source(s) of the contempt order. However, on remand, the Indiana Court likely will revisit the issue of whether to award trial attorney fees. As we determined above, Frank's child support obligation for R.J. ended when she graduated from high school in early June 2006. Consequently, on remand, Frank cannot be held in contempt for failing to pay support for her after that time.

In this appeal, Frank did not challenge the award of $3,750.00 in appellate attorney fees. *Appellant's Br*. at 13. However, because we now vacate the Indiana Court's November 2007 Order, that award no longer exists. On remand, when determining whether an award of appellate attorney fees is appropriate, we respectfully remind the Indiana Court to consider that Marla contributed to this subsequent appeal by failing to file a petition for rehearing to correct the apparent error of A.J.'s high school graduation date. In addition, we note that for an appellate court to award attorney fees, it must find the appeal to be frivolous and in bad faith. Ind. Appellate Rule 66(E); *see also Trost-Steffen v. Steffen*, 772 N.E.2d 500, 514 (Ind. Ct. App. 2002), *trans. denied* (appellate courts must use extreme restraint when exercising discretionary power to award damages, including attorney fees). We encourage the Indiana Court to exercise similar caution in deciding whether a $3,750.00 award of attorney fees in favor of Marla is appropriate, given that in *Jacks I*, we affirmed in part and reversed in part, finding merit in both parties' arguments.

Vacated and remanded with instructions.[10]

VAIDIK, J., and CRONE, J., concur.

[10] It is clear that the parties, their attorneys, and the Indiana Court have spent a significant amount of time, energy, and financial resources on this case. As Judge Thacker aptly commented, "[T]his case needs to come to some end." *Tr*. at 39. While we can appreciate that fatigue may result from the continuing and contentious nature of these proceedings, we find it disappointing that the Indiana Court considered this court's work in *Jacks I* to be "shoddy" and suggested that this court "sit[s] in their tower." *Id*. at 34.